A

Government of the State of Sabah v Suwiri Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S–01–111 OF 2004
GOPAL SRI RAM, ARIFIN ZAKARIA AND NIK HASHIM JJCA
24 OCTOBER 2005

B

Contract — Agreement to extract timber — Application by respondent for renewal or extension of Timber Licence refused by appellant — Whether appellant bound to extend licence — Whether respondent's acceptance of Form 1 Licence inconsistent with the respondent's act in seeking for an extension of the Timber Licence — Whether respondent had legitimate expectation that the Timber Licence over the whole concession area would be renewed or extended on its expiry

C

Trade and Industry — Forestry — Licence to fell and extract timber — Respondent failed or unable to complete the extraction of the timber within the period given in the Timber Licence — Application by respondent for renewal or extension of timber licence refused by appellant — Whether appellant bound to extend Timber Licencev — Whether there was a binding contract to renew the Timber Licence or alternatively whether the respondent had a legitimate expectation that the Timber Licence over the whole concession area would be renewed — Sabah Forest Enactment 1968 s 15

D

E

The respondent was granted a licence ('the Timber Licence') to fell and extract timber in a forest reserve in Keningau, Sabah comprising an area of 5,665.59 hectares. The Timber Licence, valid for five years from 13 March 1993 to 13 March 1998, was a special forest licence under s 15 of the Sabah Forest Enactment 1968 ('the Enactment') issued by the Minister. The terms and conditions of the Timber Licence were contained in the Licence Agreement executed by the respondent and the appellant. The respondent being unable to complete the extraction of the timber within the period given in the Timber Licence had on or about 22 July 1997 (eight months before it was due to expire) applied to the Setiausaha Hasil Bumi ('the SHB'), Datuk William Shim ('the Datuk') for extension of the Timber Licence until the end of the year 2000. The respondent had stated that the extraction could not be completed within the period of the Timber Licence due to rainy weather and bad road condition as well as the bridge being broken down. By a letter dated 25 November 1997 ('the SHB letter') addressed to the Director of Forestry ('the Director') the SHB agreed to the renewal of the Timber Licence covering the whole of the concession area of 5,665.59 hectares for a period until 31 December 1999 but subject to a survey to be carried out by the Director and also to the provisions of the Enactment. However, the appellant through its letter dated 16 February 1998 rejected the respondent's application to renew the Timber Licence and instead the appellant approved an area of 2,204.41 hectares only under Form 1 Licence covering the remaining unlogged concession area under the Timber Licence. The respondent accepted the Form 1 Licence and conducted logging under the same. The rest of the areas under the Timber Licence measuring 3,461.18 hectares, which the respondent had previously logged and closed by the appellant, were distributed to three other companies under separate licences. At the trial, the respondent contended that upon the SHB communicating the agreement letter to the respondent, there was a binding

F

G

H

I

contract on the appellant's part to renew the Timber Licence. The respondent also contended that its legitimate expectation that the Timber Licence over the whole of the concession area would be renewed had been violated by the appellant's rejection to renew it. The learned judicial commissioner ('JC') agreed with the respondent and ordered the appellant to pay to the respondent the sum of RM21,890,113.75 as damages for breach of contract for not renewing a timber licence. The issue for decision in this appeal was whether there was a binding contract to renew the Timber Licence or alternatively whether the respondent had a legitimate expectation that the Timber Licence over the whole concession area would be renewed at its expiry on 13 March 1998.

Held, allowing the appeal:

(1) (per **Nik Hashim JCA**) The appellant was not legally bound to renew or extend the Timber Licence to the respondent. The terms and conditions under condition 6 paragraph (vi) of the Timber Licence, which is essentially a contract expressly stated unambiguously that any coupe which has been logged by the licensee and in respect of which closing inspection has been completed, as what happened in this case, shall no longer form part of the concession area. Further, s 24(1) of the Enactment provides that the issuance of licences is a discretionary power of the Director or any person authorized by him. Thus, the respondent was estopped from claiming rights over timber within the 3,461.18 hectares which coupes the respondent had previously completed timber extraction work. So, by the terms of the Timber Licence, the 3,461.18 hectares were no longer part of the respondent's concession area. Therefore, it was the right of the appellant at the expiry of the concession to allocate the logging rights over the area to other parties as it deems fit (see para 10).

(2) (per **Nik Hashim JCA**) The acceptance by the respondent of the said Form 1 Licence was inconsistent with and could not be reconciled with the respondent seeking for an extension of the Timber Licence. The Form 1 Licence was for the remaining unlogged concession area of 2,204.41 hectares under the Timber Licence. The respondent could not take both the fresh Form 1 Licence and at the same time have a renewal of the Timber Licence in respect of the same remaining unlogged concession area of 2,204.41 hectares. In the result, the issuance of the fresh Form 1 Licence and the rejection of the Timber Licence by the appellant were regular and properly made in accordance with the provisions of the Enactment (see para 11).

(3) (per **Nik Hashim JCA**) The attempt by the respondent in justifying for the renewal of the Timber Licence due to its failure to complete the extraction of the timber in the logged coupes by citing bad weather, road conditions and collapse of the bridges under condition 21, had not been proven. As such, its application for the renewal of the Timber Licence under condition 21 must necessarily fail. Under condition 21, the Government, (in this case, the appellant) was not obliged to grant the extension to the licensee if the licensee fails to prove the matters that prevent him from carrying out his obligations under condition 6(i) and (ii) of the Timber Licence. The learned JC failed to

properly consider this condition, thereby rendering his finding on the matter defective and flawed (see paras 12–13).

(4) (per **Nik Hashim JCA**) Besides condition 21, the respondent's case also rested on the SHB letter and other correspondence passing between the SHB and the Director which the respondent claimed it was entitled to rely to establish a binding contract between the respondent and the appellant for the renewal of the Timber Licence. The respondent was never privy to the these correspondence with the exception of the Form 1 Licence issued in respect of the unlogged balance of the concession area which was communicated directly to the respondent. Therefore, the respondent could not now claim that it had concluded a contract with the appellant based on such internal correspondence between the SHB and the Director. Such internal correspondence which the respondent was never privy could confer no rights whatsoever upon the respondent (see para 14).

(5) (per **Nik Hashim JCA**) The SHB letter should not be treated as the final approval for the renewal of the Timber Licence as the letter merely stated that the application for the renewal was only agreed but subject to area survey by the Director and the provisions of the Enactment, for the actual authority to issue a timber licence including a renewal of it, vests in the Director under the Enactment and not in the Datuk who signed the letter. The Datuk had never been clothed with any statutory power to approve any licence to any applicant. Therefore, it followed that the appellant was not bound by any oral understanding. Further, there was no evidence to show that the appellant had ever held out that the Datuk to have any express authority to approve any such licence. Thus, the question as to whether the appellant could resile from the purported approval or agreement does not arise as the appellant was not legally or contractually bound to renew or extend the Timber Licence as the respondent seems to suggest. Therefore, on the facts of this case, the learned JC's finding that the SHB letter constituted a concluded contract entitling the respondent for a renewal or extension of the Timber Licence was misplaced (see paras 15–16).

(6) (per **Nik Hashim JCA**) On the facts, the respondent had failed to establish its alternative plea that it had legitimate expectation that the Timber Licence over the whole concession area would be renewed or extended on its expiry. On the whole, the appellant had not acted unfairly to the respondent in this case (see para 21).

(7) (per **Nik Hashim JCA**) The respondent must strictly prove its loss or damage. However, on the evidence, the respondent had failed to prove it. A profit projection even though unchallenged was not sufficient to establish the would-be losses of profit especially taking into account exigencies, risks and fluctuations in the logging and timber trade which will have an impact on the alleged projected profits. On the contrary, the evidence clearly showed that the respondent by obtaining two successive licences from the Director, namely the Timber Licence and the Form 1 Licence, it had, in fact, succeeded in harvesting the whole of the said concession area of 5,665.59 hectares on aggregate. Therefore, it can suffer no loss. In the circumstances, the respondent's claim for the alleged loss and damage as a result of the alleged

breach of contract was misconceived and hence, the learned JC's award of RM21,890,113.75 to the respondent with statutory interest and costs were erroneous and untenable in fact and in law (see paras 22–23).

(8) (per **Gopal Sri Ram JCA** dissenting) The respondent's case rested on the SHB letter. According to the appellant, the SHB letter was not intended for nor addressed to the respondent, therefore the decision to grant the extension sought was never communicated to the respondent so that the offer was never brought home to the respondent. But the evidence did not support that submission. Accordingly, the learned JC was quite correct in holding that there had been a concluded agreement between the parties to extend the licence agreement (see para 35).

(9) (per **Gopal Sri Ram JCA** dissenting) By the terms of clause 21 of the License Agreement, the appellant was, once it had accepted the respondent's reason for its inability to complete within the period of the original grant, obliged to grant an extension over the whole of the concession that formed the subject matter of the licence agreement. It did not do that. On the facts, the appellant was obviously satisfied with the explanation and grounds advanced by the respondent (see para 36).

(10) (per **Gopal Sri Ram JCA** dissenting) The issue of what damages should be awarded for breach of contract in a given case is fact sensitive. An appellate court ought not to intervene unless the trial court has either erred in principle or has made an award that is manifestly unjust on the facts. It was not open to the court to interfere on the finding made by the learned JC when the figures were not even challenged by the appellant. The notes of the proceedings taken down by the learned JC made it amply clear that the defendant's primary, if not its sole, target was the issue of liability and not quantum. Having taken such a position in the court below, it did not accord with justice to permit the appellant to re-open the issue before the appellate court (see paras 40 and 42).

[Bahasa Malaysia summary

Responden telah diberikan lesen ('Lesen Pembalakan') untuk menumbang dan mengambil kayu balak di hutan simpan di Keningau, Sabah yang meliputi kawasan seluas 5,665.59 hektar. Lesen Pembalakan itu, yang sah untuk lima tahun dari 13 Mac 1993 hingga 13 Mac 1998, adalah lesen perhutanan yang khas di bawah s 15 Enakmen Perhutanan Sabah 1968 ('Enakmen tersebut') yang telah dikeluarkan oleh Menteri. Terma-terma dan syarat-syarat Lesen Pembalakan itu terkandung dalam Perjanjian Perlesenan yang disempurnakan oleh responden dan perayu. Responden yang tidak dapat menghabiskan pembalakan kayu balak dalam tempoh yang diberikan dalam Lesen Pembalakan itu telah pada 22 Julai 1997 (lapan bulan sebelum ia tamat tempoh) memohon kepada Setiausaha Hasil Bumi ('SHB'), Datuk William Shim ('Datuk tersebut') untuk melanjutkan tempoh Lesen Pembalakan itu sehingga akhir tahun 2000. Responden telah menyatakan bahawa pembalakan tidak dapat diselesaikan dalam tempoh Lesen Pembalakan itu disebabkan oleh cuaca hujan dan keadaan jalan yang teruk dan juga akibat jambatan roboh. Melalui sepucuk surat bertarikh 25 November 1997 ('surat SHB') yang dialamatkan kepada Pengarah Perhutanan ('Pengarah tersebut'), SHB telah bersetuju terhadap pembaharuan Lesen

A Pembalakan yang meliputi keseluruhan kawasan konsesi seluas 5,665.59 hektar itu untuk satu tempoh sehingga 31 Disember 1999 tetapi tertakluk kepada pemantauan yang dilaksanakan oleh Pengarah tersebut dan juga peruntukan-peruntukan Enakmen tersebut. Bagaimanapun, perayu melalui suratnya bertarikh 16 Februari 1998 telah menolak permohonan responden untuk memperbaharui Lesen
B Pembalakan dan sebaliknya perayu meluluskan satu kawasan seluas 2,204.41 hektar sahaja di dalam Borang 1 Lesen yang meliputi kawasan konsesi yang masih belum dijalankan pembalakan di bawah Lesen Pembalakan. Responden telah menerima Borang 1 Lesen itu dan menjalani pembalakan berdasarkan yang sama. Kawasan selainnya di bawah Lesen Pembalakan itu yang berukuran 3,461.18 hektar, yang mana responden sebelumnya telah melakukan pembalakan dan ditutup oleh perayu,
C telah diagihkan kepada tiga syarikat lain di bawah lesen berasingan. Semasa perbicaraan, responden menegaskan bahawa setelah SHB menyampaikan surat perjanjian kepada responden, terdapat satu kontrak yang mengikat di pihak perayu untuk memperbaharui Lesen Pembalakan. Responden juga menegaskan bahawa harapan yang sah agar Lesen Pembalakan ke atas keseluruhan kawasan konsesi akan
D diperbaharui telah dicabuli oleh penolakan perayu untuk memperbaharuinya. Pesuruhjaya kehakiman yang bijaksana ('PK') telah bersetuju dengan responden dan memerintahkan perayu membayar kepada responden sejumlah RM21,809,113.75 sebagai ganti rugi untuk perlanggaran kontrak kerana tidak memperbaharui lesen pembalakan. Persoalan untuk ditentukan dalam rayuan ini adalah sama ada terdapat kontrak yang mengikat untuk memperbaharui Lesen Pembalakan atau secara
E alternatifnya sama ada responden mempunyai harapan yang sah agar Lesen Pembalakan ke atas keseluruhan kawasan konsesi itu akan diperbaharui apabila ia tamat tempoh pada 13 Mac 1998.

F **Diputuskan**, menolak rayuan tersebut:

(1) (oleh **Nik Hashim HMR**) Perayu tidak terikat secara sah untuk memperbaharui atau melanjutkan Lesen Pembalakan itu kepada responden. Terma-terma dan syarat-syarat di bawah syarat 6 perenggan (vi) Lesen Pembalakan itu, yang khususnya suatu kontrak yang dengan jelas menyatakan
G secara tidak taksa bahawa mana-mana kawasan yang telah dilakukan kerja pembalakan oleh pemegang lesen dan berhubung pemantauan tertutup yang telah dilaksanakan, sebagaimana yang berlaku dalam kes ini, tidak lagi membentuk sebahagian daripada kawasan konsesi. Selanjutnya, s 24(1) Enakmen tersebut memperuntukkan bahawa pengeluaran lesen-lesen
H merupakan budi bicara Pengarah atau sesiapa yang diberi kuasa oleh beliau. Oleh itu, responden diestopkan daripada menuntut hak ke atas kayu balak seluas 3,461.18 hektar yang merupakan kawasan yang mana kerja-kerja pembalakan responden sebelumnya telah diselesaikan. Oleh itu, berdasarkan terma Lesen Pembalakan, 3,461.18 hektar bukan lagi sebahagian daripada kawasan konsesi. Justeru itu, perayu adalah betul pada masa peluputan konsesi
I itu untuk mengagihkan hak pembalakan ke atas kawasan tersebut kepada pihak lain jika difikirkan sesuai (lihat perenggan 10).

(2) (oleh **Nik Hashim HMR**) Penerimaan oleh responden terhadap Borang 1 Lesen itu tidak konsisten dan tidak boleh diterima dengan responden yang memohon satu lanjutan untuk Lesen Pembalakan. Borang 1 Lesen adalah

untuk kawasan konsesi yang masih belum dilakukan kerja-kerja pembalakan seluas 2,204.41 hektar di bawah Lesen Pembalakan. Responden tidak boleh mengambil kedua-dua Borang 1 Lesen baru dan pada sama membuat pembaharuan terhadap Lesen Pembalakan itu berkaitan kawasan konsesi yang masih belum dilakukan kerja-kerja pembalakan seluas 2,204.41 hektar itu. Akibatnya, pengeluaran Borang 1 Lesen yang baru dan penolakan Lesen Pembalakan oleh perayu telah dibuat mengikut aturan dan betul bersesuaian dengan peruntukan Enakmen tersebut (lihat perenggan 11).

(3) (oleh **Nik Hashim HMR**) Percubaan oleh responden dalam menjustifikasikan pembaharuan Lesen Pembalakan disebabkan kegagalannya untuk menyelesaikan pembalakan kayu balak di kawasan pembalakan dengan memberi alasan cuaca buruk, keadaan jalan raya dan jambatan yang runtuh di bawah syarat 21, tidak dibuktikan. Oleh itu, permohonannya untuk pembaharuan Lesen Pembalakan di bawah syarat 21 gagal. Di bawah syarat 21, Kerajaan, (dalam kes ini, perayu) tidak diwajibkan memberi lanjutan kepada pemegang lesen jika pemegang lesen gagal untuk membuktikan perkara-perkara yang menghalangnya daripada menjalankan kewajipannya di bawah syarat 6(i) dan (ii) Lesen Pembalakan. Pesuruhjaya Kehakiman yang bijaksana gagal untuk mempertimbangkan dengan betul syarat ini, oleh itu menyebabkan penemuan beliau berhubung perkara tersebut defektif dan cacat (lihat perenggan 12–13).

(4) (oleh **Nik Hashim HMR**) Selain daripada syarat 21, kes responden juga berdasarkan surat SHB dan perhubungan lain yang berlaku antara SHB dan Pengarah tersebut yang mana responden mendakwa ia berhak untuk bergantung kepadanya bagi membuktikan terdapat satu kontrak yang mengikat antara responden dan perayu untuk pembaharuan Lesen Pembalakan. Responden bukan privy dalam perhubungan berikut kecuali Borang 1 Lesen yang dikeluarkan berhubung baki kawasan konsesi yang masih belum dilakukan kerja-kerja pembalakan yang dimaklumkan terus kepada responden. Oleh itu, responden tidak boleh sekarang menuntut bahawa ia telah menyempurnakan satu kontrak dengan perayu berdasarkan perhubungan dalaman antara SHB dan Pengarah tersebut. Perhubungan dalaman sedemikian yang mana responden bukan privy tidak memberikan apa-apa hak ke atas responden (lihat perenggan 14).

(5) (oleh **Nik Hashim HMR**) Surat SHB tidak boleh dianggap sebagai kelulusan terakhir untuk pembaharuan Lesen Pembalakan kerana surat tersebut hanya menyatakan bahawa permohonan untuk pembaharuan itu hanya dipersetujui tertakluk kepada pemantauan kawasan oleh Pengarah tersebut dan peruntukan Enakmen tersebut, manakala kuasa sebenar bagi mengeluarkan lesen pembalakan termasuklah pembaharuannya, terletak pada Pengarah tersebut di bawah Enakmen tersebut dan bukan pada Datuk tersebut yang menandatangani surat itu. Datuk tersebut tidak pernah mempunyai apa-apa kuasa statutori untuk meluluskan apa-apa lesen kepada mana-mana pemohon. Oleh itu, perayu tidak terikat oleh apa-apa persefahaman secara lisan. Bahkan, tidak terdapat apa-apa keterangan untuk menunjukkan bahawa perayu pernah menyatakan bahawa Datuk tersebut mempunyai apa-apa kuasa nyata untuk meluluskan lesen sedemikian. Justeru itu, persoalan berhubung sama ada

perayu boleh mengundur diri daripada kelulusan atau perjanjian yang dimaksudkan tidak timbul kerana perayu tidak terikat secara sah atau kontraktual untuk memperbaharui atau melanjutkan Lesen Pembalakan sebagaimana yang responden cadangkan. Dengan itu, berdasarkan fakta-fakta kes ini, penemuan PK yang bijaksana bahawa surat SHB membentuk suatu kontrak sempurna yang melayakkan responden mendapat pembaharuan atau pelanjutan Lesen Pembalakan adalah salah (lihat perenggan 15–16).

(6) (oleh **Nik Hashim HMR**) Berdasarkan fakta berikut, responden telah gagal untuk membuktikan pli alternatifnya bahawa ia mempunyai harapan yang sah bahawa Lesen Pembalakan ke atas keseluruhan kawasan konsesi tersebut akan diperbaharui atau dilanjutkan setelah ia luput. Pada keseluruhannya, perayu tidak bertindak dengan adil kepada responden dalam kes ini (lihat perenggan 21).

(7) (oleh **Nik Hashim HMR**) Responden hendaklah membuktikan kerugian atau kerosakannya. Namun, berdasarkan keterangan, responden telah gagal untuk membuktikannya. Unjuran keuntungan meskipun tidak dicabar tidak memadai untuk menunjukkan kerugian memperoleh keuntungan masa hadapan dalam dagangan pembalakan yang akan memberi kesan kepada unjuran keuntungan yang dikatakan. Sebaliknya, keterangan tersebut dengan jelas menunjukkan bahawa responden dengan jayanya memperoleh dua lesen daripada Pengarah tersebut, terutamanya Lesen Pembalakan dan Borang 1 Lesen, ia telah, pada hakikatnya, berjaya melapangkan keseluruhan kawasan konsesi seluas 5,665.59 hektar tersebut. Oleh itu, ia tidak mengalami sebarang kerugian. Dalam keadaan ini, tuntutan responden untuk kerugian dan kerosakan akibat daripada perlanggaran kontrak yang dikatakan itu disalah tanggap dan justeru itu, award PK yang bijaksana sejumlah RM21,890,113.75 kepada responden berserta faedah statutori dan kos adalah salah dan tidak boleh dipertahankan (lihat perenggan 22–23).

(8) (oleh **Gopal Sri Ram HMR** menentang) Kes responden adalah berdasarkan surat SHB. Menurut perayu, surat SHB tidak diniatkan kepada mahupun dialamatkan kepada responden, oleh itu keputusan untuk memberikan lanjutan yang dipohon tidak pernah disampaikan kepada responden dan oleh itu tawaran tersebut tidak pernah sampai kepada responden. Namun keterangan tidak menyokong hujah itu. Sewajarnya, PK yang bijaksana sebenarnya betul dalam membuat keputusan bahawa terdapat satu perjanjian yang disempurnakan antara pihak-pihak untuk melanjutkan perjanjian pelesenan itu (lihat perenggan 35).

(9) (oleh **Gopal Sri Ram HMR** menentang) Berdasarkan terma-terma fasal 21 Perjanjian Pelesenan, perayu adalah, setelah ia menerima alasan responden berhubung ketidakupayaan menyelesaikan dalam tempoh persetujuan asal, wajib memberikan satu lanjutan ke atas keseluruhan konsesi yang membentuk perkara pokok perjanjian pelesenan. Ia tidak berbuat demikian. Berdasarkan fakta-fakta tersebut, perayu jelas berpuas hati dengan penjelasan dan alasan-alasan yang dikemukakan oleh responden (lihat perenggan 36).

(10) (oleh **Gopal Sri Ram HMR** menentang) Persoalan tentang apakah ganti rugi yang patut diawardkan untuk perlanggaran kontrak dalam suatu kes adalah

suatu perkara yang sensitif. Mahkamah rayuan tidak patut campur tangan kecuali mahkamah bawahan telah terkhilaf dalam prinsip ataupun telah membuat award yang sememangnya tidak adil berdasarkan fakta-fakta tersebut. Ia tidak terbuka kepada mahkamah untuk campur tangan dengan penemuan yang dibuat oleh PK yang bijaksana apabila nilai tersebut tidak pun dicabar oleh perayu. Nota prosiding yang ditulis oleh PK yang bijaksana dengan jelas menyatakan bahawa sasaran utama, jika tidak tunggal defendan, adalah tentang persoalan liabiliti dan bukan kuantum. Berdasarkan kedudukan mahkamah bawahan adalah sedemikian, ia tidak melakukan keadilan dengan membenarkan perayu membuka semula persoalan tersebut di hadapan mahkamah rayuan (lihat perenggan 40 dan 42).]

Notes

For cases on agreement to extract timber generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2145–2149.

For cases on forestry generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1618–1625.

Cases referred to

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35 (refd)

Griffin v Pelton [1958] Ch 205 (refd)

Helby v Matthews [1895] AC 471 (refd)

KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627 (refd)

Kerrison v Smith [1895–9] All ER Rep 215 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Minister of Resource Planning & Ors v Keruntum Sdn Bhd [1988] 2 MLJ 226 (refd)

Routledge v Grant (1828) 130 ER 920 (refd)

Ruxley Electronics & Construction Ltd v Forsyth [1996] AC 344 (refd)

Sharma Transport v Government of Andhra Pradesh AIR 2002 SC 322 (refd)

Sime Properties Bhd v Woon Nyoke Lin [2002] 3 CLJ 719 (refd)

Spiro v Glencrown Properties Ltd [1991] Ch 537 (refd)

State of Punjab v Nestle Indian Ltd [2004] 2 LRI 839 (refd)

Union of India v Anglo-Afghan Agencies Ltd AIR 1968 SC 718 (refd)

Legislation referred to

Sabah Forest Enactment 1968 ss 15, 24(1)

Appeal from: Suit No K 22–69 of 2000 (High Court, Kota Kinabalu)

Juprin Wong-Adamal (Senior State Counsel, State Attorney General, Sabah) for the appellant.

Datin Marina Tiu (Yap Chin & Tiu) for the respondent.

Nik Hashim JCA (delivering majority judgment of the court):

BACKGROUND

[1] This appeal arises from the judgment of the High Court at Kota Kinabalu ordering the appellant to pay to the respondent the sum of RM21,890,113.75 as damages for breach of contract for not renewing a timber licence. Interest at 8% per annum from the date of the judgment till full settlement and costs were also awarded to the respondent.

[2] The respondent was granted a licence ('the Timber Licence') to fell and extract timber in a forest reserve in Keningau, Sabah comprising an area of 5,665.59 hectares. The Timber Licence, valid for five years from 13 March 1993 to 13 March 1998, was a special forest licence under s 15 of the Sabah Forest Enactment 1968 ('the Enactment') issued by the Minister. The terms and conditions of the Timber Licence are contained in the Licence Agreement executed by the respondent and the appellant in March 1993.

[3] For consideration of the present case, the following conditions are relevant:

Condition 6

In the extraction operation the Licensee (the respondent) shall observe the following rules:

(i) The licence area shall be divided into a series of coupes, which is approximately 1,133.118 ha. The coupe shall be selected by the Licensee, in consultation with the Director, within the licenced area. However, the final decision of the location of any coupe or coupes shall lie with the Director.

(ii) The division of the licensed area into a series of coupes shall be done in such a manner that extraction operation shall commence in one new coupe annually and such division shall take into consideration the following requirements namely:

(a) working convenience for the licensee,

(b) methodical exploitation of the licensed area in such a manner that places which are easily accessible and places where extraction is more difficult and expensive, shall be worked out simultaneously on a scale appropriate to their distribution in the licensed area.

(iii)-(v)

(vi) The Licensee shall within one calendar year from date of issuance of any coupe, complete the extraction therefrom, all merchantable timber and the extension of the period shall be considered upon satisfaction of the Director. No new coupe should be issued until the preceeding coupe has been fully extracted and closed. The coupe which has been closed shall cease to be or form part of the licensed area.

(vii)-(xxiii)

Condition 21

If the Licensee shall be prevented by Act of God, war, acts of the enemies of Malaysia, civil commotion, or by any industrial dispute or other cause beyond the Licensee's control, from carrying out his obligations under condition 6(i) and (ii), the Government shall grant to the

Licensee such extension of time or other modifications in the Licensee's obligations under these conditions, as may be reasonable and necessary, having regard to all the circumstances.

[4] The respondent being unable to complete the extraction of the timber within the period given in the Timber Licence had on or about 22 July 1997 (eight months before it was due to expire) applied to the Setiausaha Hasil Bumi ('the SHB'), Datuk William Shim ('the Datuk') for extension of the Timber Licence until the end of the year 2000. The respondent had stated that the extraction could not be completed within the period of the Timber Licence due to rainy weather and bad road condition as well as the bridge being broken down.

[5] By a letter dated 25 November 1997 ('the SHB letter') addressed to the Director of Forestry ('the Director'), the SHB agreed to the renewal of the Timber Licence covering the whole of the concession area of 5,665.59 hectares for a period until 31 December 1999 but subject to a survey to be carried out by the Director and also to the provisions of the Enactment. The following is the SHB letter, on which the respondent based its claim against the appellant:

25 November 1997

Jabatan Ketua Menteri

(Chief Minister's Department)

Kota Kinabalu Sabah, Malaysia

Pengarah Perhutanan,

Jabatan Perhutanan,

Beg Berkunci No 68

90009 Sandakan

Permohonan Pembaharuan Lesen Hutan No JP(NNN) 042/93 (SP) Seluas 5,665.59 Hektar Di Sg. Talangkai oleh Suwiri Sdn Bhd Bil: JP(P) 00/02/01/3/142/26 bertarikh 29 Ogos 1997

Dengan hormatnya, saya merujuk kepada perkara tersebut di atas.

2. Syarikat Suwiri Sdn Bhd memohon supaya Lesen Hutan No JP(NNN) 042/93 (SP) seluas 5,665.59 hektar di Sg.Talangkai diperbaharui.

Permohonan ini telahpun dirujuk kepada tuan dan permohonan disyorkan diperbaharui bagi kawasan seluas 2,204.42 hektar sahaja melalui surat Bil: JP(P) 02/01//3/142/26 bertarikh 29 Ogos 1997.

Setelah permohonan ini dikaji dan ke atas penjelasan seperti surat Bil: SWR/KPPW/97/11/1-001 bertarikh 13 November 1997 yang dialamatkan kepada Ketua Pegawai Perhutanan Wilayah, Keningau dan latar belakang aktiviti pembalakan yang dijalankan dalam Kup 1993 [(JP(NNN) 042/92 (SP)] dan Kup 1994 [(JP(NNN) 042/92 (SP)], permohonan syarikat untuk memperbaharui keseluruhan kawasan seluas 5,665.59 hektar adalah dipersetujui tertakluk kepada kajian lapan oleh pihak tuan dan tertakluk kepada peruntukan-peruntukan Enakmen Hutan 1968. Lesen hutan yang akan dikeluarkan adalah bagi tempoh sehingga 31 Disember 1999.

A Berkhidmat Untuk Negara dengan Bersih, Cekap dan Amanah

(sgd)

(Datuk William Shim)

Setiausaha Hasil Bumi

B (Emphasis added.)

[6] However, the appellant through its letter dated 16 February 1998 rejected the respondent's application to renew the Timber Licence and instead the appellant approved an area of 2,204.41 hectares only under Form 1 Licence covering the C remaining unlogged concession area under the Timber Licence. The respondent accepted the Form 1 Licence and conducted logging under the same. The rest of the areas under the Timber Licence measuring 3,461.18 hectares, which the respondent had previously logged and closed by the appellant, were distributed to three other companies under separate licences.

D

[7] At the trial, the respondent contended that upon SHE communicating the agreement letter to the respondent there was a binding contract on the appellant's part to renew the Timber Licence. The respondent also contended that its legitimate expectation that the Timber Licence over the whole of the concession area would be E renewed had been violated by the appellant's rejection to renew it.

[8] The learned judicial commissioner ('JC') (as he then was) agreed with the respondent, and amongst other things, he ruled that:

F > ... the Approval Letter (the SHE letter) constitutes a promise made in response to the plaintiffs' (the respondent's) application for renewal under the Timber Licence and the fact that the Approval Letter is not addressed to the plaintiffs does not, in my view, diminish its effectiveness because it is inextricably linked to condition 21 of the Timber Licence under which the plaintiffs are entitled to a renewal or extension of the Timber Licence.

G Thus, the learned JC made the orders as mentioned at the outset. Hence, this appeal by the appellant.

[9] Both parties before us agreed that the only issue for decision in this appeal is whether there was a binding contract to renew the Timber Licence or alternatively whether the respondent had a legitimate expectation that the Timber Licence over H the whole concession area would be renewed at its expiry on the 13 March 1998.

FINDINGS

Contract

I **[10]** In my judgment, the appellant was not legally bound to renew or extend the Timber Licence to the respondent. The terms and conditions under condition 6 paragraph (vi) of the Timber Licence, which is essentially a contract (see *Minister of Resource Planning & Ors v Keruntum Sdn Bhd* [1988] 2 MLJ 226 at p 231), expressly stated unambiguously that any coupe which has been logged by the licensee and in

respect of which closing inspection has been completed, as what happened in this case, shall no longer form part of the concession area. Further, s 24(1) of the Enactment provides that the issuance of licences is a discretionary power of the Director or any person authorized by him. Thus, the respondent is estopped from claiming rights over timber within the 3,461.18 hectares which coupes the respondent had previously completed timber extraction work. So, by the terms of the Timber Licence, the 3,461.18 hectares are no longer part of the respondent's concession area. Therefore, it is the right of the appellant at the expiry of the concession to allocate the logging rights over the area to other parties as it deems fit.

[11] Clearly, a renewal of the Timber Licence to also include the coupes comprised in the concession area of 3,461.18 hectares which had been logged by the respondent, would be contrary to the express terms and conditions of the Timber Licence with specific reference to condition 6(vi) thereof. The acceptance by the respondent of the said Form 1 Licence is inconsistent with and cannot be reconciled with the respondent seeking for an extension of the Timber Licence. The Form 1 Licence is for the remaining unlogged concession area of 2,204.41 hectares under the Timber Licence. Surely, the respondent must know that it cannot take both the fresh Form 1 Licence and at the same time have a renewal of the Timber Licence in respect of the same remaining unlogged concession area of 2,204.41 hectares. In the result, the issuance of the fresh Form 1 Licence and the rejection of the Timber Licence by the appellant were regular and properly made in accordance with the provisions of the Enactment.

[12] Moreover, the attempt by the respondent in justifying for the renewal of the Timber Licence due to its failure to complete the extraction of the timber in the logged coupes by citing bad weather, road conditions and collapse of the bridges under condition 21, had not been proven. Other than recalling the meeting between PW1 and the Datuk, and the production of the undated application letter to renew licence at p 207 Part C of the appeal record, nothing else was offered to the court by way of solid proof such as photographs and other documentary evidence to substantiate the respondent's claim. As such, its application for the renewal of the Timber Licence under condition 21 must necessarily fail.

[13] Under condition 21, the Government, (in this case, the appellant) is not obliged to grant the extension to the licensee if the licensee fails to prove the matters that prevent him from carrying out his obligations under condition 6(i) and (ii) of the Timber Licence. Unfortunately, the learned JC failed to properly consider this condition, thereby rendering his finding on the matter defective and flawed.

[14] Besides condition 21, the respondent's case also rested on the SHE letter and other correspondence passing between the SHB and the Director which the respondent claimed it was entitled to rely to establish a binding contract between the respondent and the appellant for the renewal of the Timber Licence. The evidence of PW1 clearly shows that the respondent was never privy to the these correspondence with the exception of the Form 1 Licence issued in respect of the unlogged balance of the concession area which was communicated directly to the respondent. Therefore, the respondent could not now claim that it has concluded a contract with

A the appellant based on such internal correspondence between the SHB and the Director. In my view, such internal correspondence which the respondent was never privy could confer no rights whatsoever upon the respondent.

[15] Further, the SHB letter cannot be treated as the final approval for the renewal
B of the Timber Licence as the letter merely stated that the application for the renewal was only agreed but subject to area survey by the Director and the provisions of the Enactment (permohonan dipersetujui tertakluk kepada kajian lapan oleh pihak tuan dan tertakluk kepada peruntukan-peruntukan Enakmen Hutan 1968), for the actual authority to issue a timber licence including a renewal of it, vests in the Director
C under the Enactment and not in the Datuk who signed the letter.

[16] The Datuk had never been clothed with any statutory power to approve any licence to any applicant. Therefore, it follows that the appellant was not bound by any oral understanding if there was any, between PW1 and the said Datuk. Further,
D there was no evidence to show that the appellant had ever held out that the said Datuk to have any express authority to approve any such licence. Thus, the question as to whether the appellant could resile from the purported approval or agreement does not arise as the appellant was not legally or contractually bound to renew or extend the Timber Licence as the respondent seems to suggest. Therefore, on the facts
E of this case, the learned JC's finding that the SHE letter constitutes a concluded contract entitling the respondent for a renewal or extension of the Timber Licence is misplaced.

[17] Learned counsel for the respondent drew our attention to the case of*Kerrison*
F *v Smith* [1895–9] All ER Rep 215 to show that the respondent could maintain an action for breach of contract in the present case. There, the defendant verbally agreed to let the plaintiff have the use of a wall for advertising by bill posting on a yearly tenancy at an annual rent, the plaintiff to erect a hoarding. The plaintiff erected a hoarding, displayed posters thereon, and paid the rent for some years. The defendant
G gave the plaintiff notice to remove the hoarding and soon afterwards he removed it himself. In an action by the plaintiff for breach of contract, it was held that although the plaintiff had a mere licence not coupled with an interest which the defendant could revoke at any time without being liable to an action for trespass, the right of the defendant as licensor to revoke and the right of the plaintiff as licensee to sue for breach of contract in respect of such revocation, were co-existent, and, therefore, the
H plaintiff could maintain an action for breach of contract.

[18] The facts in *Kerrison* are obviously distinguishable in that the present case does not concern with revocation of a licence but renewal of a timber licence subject to a condition under condition 21 while *Kerrison* has no such condition. Further, the
I licence in the instant case was issued under a statutory authority, whereas in *Kerrison*, the licence was a simple and straight forward one given by a private individual to another. Thus, *Kerrison* is of no assistance to the respondent.

.

Legitimate expectation

[19] The learned JC cited correctly the following cases to explain the concept of legitimate expectation: **A**

In *R v Secretary of State for the Home Department; ex parte Khan* [1985] 1 All ER 40 at p 47:

> 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis. **B**

(see [1983] 2 All ER 346 at p 350, [1983] 2 AC 629 at p 636).

> The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry. **C**

And in *R v Devon County Council; ex parte Baker & Anor, R v Durham County Council; ex parte Curtis & Anor* [1995] 1 All ER 73 at pp 88–89:

> It is first, I think convenient to identify, at least in broad categories, various of the distinct sense in which the phrase 'legitimate expectation' is nowadays used. **D**

(1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him....

> These various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel.... **E**

(2) Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words, the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.... **F** **G**

(3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him...

(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice. **H**

(see also *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1). **I**

[20] However, I am constrained to hold that the learned JC misapplied the principle to the facts of the case. I agree with the appellant that the non-approval by

the appellant of the respondent's purported application to renew or extend the Timber Licence was not a violation of the respondent's so-called legitimate expectation, because:

(i) The appellant, being the government or a public authority cannot be prevented or estopped by its previous conduct to curb its obligation to carry out its statutory powers or duties. In the instant case, by its action or suit the respondent is estopping the appellant and the Director to exercise their statutory powers or duties under the provisions of the Enactment in a manner which would prevent them from issuing a licence to any other applicant. It must be noted that the respondent has benefited from the concession area for five years. Further, the respondent was not deprived of the right to log the remaining concession area of 2,204.41 hectares albeit under the fresh Form 1 licence.

(ii) There can be no renewal of any coupes under the Timber Licence which had been logged and closed because there cannot be a renewal of a closed area as it has ceased to be or form part of the concession area [see condition 6(vi)].

(iii) The respondent had failed to prove that the Datuk had the authority to commit and bind the appellant into renewing the Timber Licence for the respondent. Moreover, the Datuk had no vested statutory power to approve any timber licence or any renewal of the Timber Licence to the respondent under the Enactment.

(iv) The respondent can acquire no rights pursuant to the official internal documents passing within the appellant and never communicated to the respondent.

(v) There exist various factors or criteria for the Director to study and examine before the actual offer to issue licence could be finalized. The testimony of DW1 also shows that government policies on the renewal of a timber extraction licence had to be adhered to. Therefore, the respondent's contention that the issuance of a licence is a mere formality is indeed misconceived.

[21] Thus, on the facts, the respondent had failed to establish its alternative plea that it had legitimate expectation that the Timber Licence over the whole concession area would be renewed or extended on its expiry. On the whole, the appellant had not acted unfairly to the respondent in this case.

Damages

[22] As for the claim for damages for breach of contract, the respondent must strictly prove its loss or damage. In the present case, the learned JC awarded the respondent RM21,890.113.75 as damages for the defendant's alleged breach of contract on the unchallenged evidence of PW2 which appeared to the learned JC to be clear and comprehensive. However, on the evidence, the respondent had failed to prove it. A profit projection even though unchallenged is not sufficient to establish the would-be losses of profit especially taking into account exigencies, risks and fluctuations in the logging and timber trade which will have an impact on the alleged projected profits (see *Sime Properties Bhd v Woon Nyoke Lin* [2002] 3 CLJ 719; *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627).

[23] On the contrary, the evidence clearly shows that the respondent by obtaining two successive licences from the Director, namely the Timber Licence and the Form 1 Licence, it had, in fact, succeeded in harvesting the whole of the said concession area of 5,665.59 hectares on aggregate. Therefore, it can suffer no loss. In the circumstances, the respondent's claim for the alleged loss and damage as a result of the alleged breach of contract is misconceived and hence, the learned JC's award of RM21,890,113.75 to the respondent with statutory interest and costs are erroneous and untenable in fact and in law.

.

Cross appeal

[24] The respondent's cross-appeal for the increase in the amount of damages awarded and the claim for the interest incurred on the loan taken by the respondent were not pursued by the respondent. As such, I feel disposed to dismiss it with no order as to costs.

CONCLUSION

[25] Finally, on the facts, I conclude by saying that the learned JC had erred when he allowed the respondent's claim with costs. It is my view that the non-approval by the appellant of the respondent's application to renew or extend the Timber Licence did not amount to a breach of contract as there was no binding or concluded contract to renew or extend the Timber Licence to the latter; neither did the respondent has a legitimate expectation that the Timber Licence over the whole concession area would be renewed or extended. Accordingly, I allow the appeal with costs here and below and set aside the orders of the learned judge. The respondent's suit is hereby dismissed.

[26] My learned brother, Arifin Zakaria FCJ has read this judgment in draft and has expressed his agreement with it.

Gopal Sri Ram JCA (delivering dissenting judgment):

[27] The appellant before us (the defendant in the court below) is the Government of the State of Sabah. Its complaint is that the High Court in Kota Kinabalu erred in finding it liable to the respondent for breach of contract. My learned brother Nik Hashim JCA (now FCJ) has in a judgment that I have had the advantage of reading and in which my learned brother Ariffin Zakaria JCA (now FCJ) concurs reached the conclusion that this appeal must succeed. It is entirely my misfortune that I am unable to agree with my brother's learned judgment. I think that the appeal must fail. My reasons are as follows.

[28] There is, we have been told by learned counsel for the appellant two questions that call for determination. First, was there a binding contract to renew the respondent's licence to log? If there was no such contract, then, did the respondent have a legitimate expectation to have the licence it had over the whole of the original

logging area renewed? To resolve these questions, an overview of the facts is necessary. These have been — to adopt the expression in current use – sufficiently interrogated by the judicial commissioner who tried the case. All I need do is summarise his findings of fact with which this court will not, in accordance with settled practice, interfere. And these are the facts.

[29] The respondent is a logging contractor. In March 1993, it applied for and obtained a licence to fell and extract timber in a forest reserve in the Keningau Region comprising an area of 5,665.59 hectares. The licence in question was issued pursuant to s 15 of the Sabah Forest Enactment 1968. That section reads as follows:

> (1) Save as otherwise provided in this Enactment and notwithstanding the provisions of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of, a licence agreement entered into by the Minister with the approval of the Cabinet or of a licence.
>
> (1A)A licence agreement entered into by the Minister under subsection (1) of this section may provide for the planting of forest or timber trees upon such terms and conditions as may be agreed.
>
> (2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision of this Enactment compliance with the provisions of such licence agreement shall be deemed to be compliance with the provisions of this Enactment:
>
> Provided that no licence shall be issued or no licence agreement shall be entered into under this Enactment in respect of Forest Reserves of Class I, Class VI and Class VII.

[30] It will be seen at once that a s 15 licence is not a mere licence revocable at will by the grantor, viz, the State Government. It is, as the section describes it, a licence agreement. In other words, it is a licence coupled with a contract. It is document which creates in the grantee, rights in a Forest Reserve. That this is the effect of the section is confirmed by the marginal note which reads 'Acquisition of rights in Forest Reserve'. Is the marginal note admissible that may be used to determine what sort of rights the State Legislature intended to create by means of the section? I think it can. And there is respectable authority that says so.

[31] In *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, Abdoolcader SCJ when delivering the judgment of the Supreme Court said (at p 42):

> A side note or marginal note to a section is part of the statute. It may be considered in construing the section or any other provision of the statute, provided due account is taken of the fact that its function is merely to serve as a brief guide to the content of the section. Collins MR in *Bushell v Hammond* [1904] 2 KB 563 took the approach that the marginal note, while forming no part of the section, was of some assistance as it showed the drift of the section. In *Reg v Schildkamp* [1971] AC 1, Lord Reid and Lord Upjohn took the view that the marginal or side note will rarely be of any use in interpreting a statute but that they

should not be rejected completely as aids, the former putting this (at p 10) on the basis that it is the whole statute that is the product of the legislature and that therefore the whole statute can be looked at if any doubt should arise as to its meaning.

[32] The licence in this case was not just for a year. It was granted for the period 13 March 1993 to 13 March 1998. And it was accompanied by a contract in writing cl 21 of which reads as follows:

> If the Licensee shall be prevented by Act of God, war, acts of the enemies of Malaysia, civil commotion, or by any industrial dispute or other cause beyond the Licensee's control, from carrying out his obligations under Condition 6(i) and (ii), the Government shall grant to the Licensee such extension of time or other modifications in the Licensee's obligations under these conditions, as may be reasonable and necessary, having regard to all the circumstances. (Emphasis added.)

[33] The respondent's case is that it was unable to complete its obligations within the five-year licence period because of a cause beyond its control within cla 21 of the licence agreement. That cause was torrential rain. The appellant was obviously satisfied with the explanation and grounds advanced by the respondent. So it wrote a letter dated 25 November 1997 to the Director of Forests. That letter, which the judicial commissioner produced in full in his judgment, says two things. First it informed the Director that the respondent's application for renewal in respect of the whole of the 5,665.59 hectares had been approved. Second, it asked the Director to renew the licence. However, as matters turned out, the appellant issued a new licence confining the plaintiffs to a substantially reduced area of 2204.41 hectares whilst the remainder was distributed to three other companies under separate licences. The respondent was unhappy and brought an action in which, as I have already said, it succeeded.

[34] Before turning to consider the appellant's complaints about the judicial commissioner's reasoning, it is, I think, important to inquire how the law regards an option such as the one in cl 21 of the licence agreement. An option, generally speaking, is a term of a contract which makes it obligatory for the grantor of the option to do something, such as renewing a lease or, as here, a licence coupled with an interest, or the transfer of real or personal property to the grantee upon the happening of an event which may or may not involve the doing of some act by the grantee, such as exercising the option or, as here, fulfilling some condition. It has been called a conditional contract (see *Griffin v Pelton* [1958] Ch 205) or an irrevocable offer (see *Helby v Matthews* [1895] AC 471, per Lord Herschell and also the dicta in *Routledge v Grant* (1828) 130 ER 920). But in reality it is both of these mutually inconsistent concepts; depending upon whose side you are viewing it from. When you look at it from the point of view of the grantor between the grant of the option and its exercise, it is a conditional or a contingent contract in the sense that once the grantee fulfils the condition imposed by the option, eg by making payment of a sum of money such as a deposit, the grantor is obliged to fulfil his part of the contract, eg by granting the renewal of a lease or by transferring some property or entering into another binding contract. But when you look at it from the point of view of the grantee, it is an irrevocable offer by the grantor, that is to say, a promise,

which creates no obligation for the breach of which he will become liable in damages. This is what led Hoffmann J in *Spiro v Glencrown Properties Ltd* [1991] Ch 537 to say this:

> An option is not strictly speaking either an offer or a conditional contract. It does not have all the incidents of the standard form of either of these concepts. To that extent it is a relationship sui generis. But there are ways in which it resembles each of them. Each analogy is in the proper context a valid way of characterising the situation created by an option.

[35] Before us, the appellant argued that the finding of the learned judge that there was a concluded agreement is wrong. According to Mr Juprin Wong-Adamal, the respondent's case rested on the internal document, namely, the letter dated 25 November 1997. That document, it was submitted for the appellant, was not intended for nor addressed to the respondent. Accordingly, the decision to grant the extension sought was never communicated to the respondent so that the offer was never brought home to the respondent. But the evidence does not support that submission. PW 1 in his evidence said that he had learned about the grant of the extension from Datuk William Shim, the writer of the letter of 25 November 1997. And PW1's evidence on this point was never challenged by the appellant. Accordingly, in my judgment the learned judicial commissioner was quite correct in holding that there had been a concluded agreement between the parties to extend the licence agreement.

[36] There is this further point. If the appellant had wrongly refused an extension and if the respondent had established that its case fell within cl 21, it would have been entitled to damages for breach of contract. This is because cl 21 makes it obligatory for the appellant to grant an extension upon the happening of one or more of the events described in it. It is pertinent then to ask why the respondent should fail for the much stronger reason that the extension had in fact been granted. Put in another fashion, by the terms of cl 21, the appellant was, once it had accepted the respondent's reason for its inability to complete within the period of the original grant, obliged to grant an extension over the whole of the concession that formed the subject matter of the licence agreement. It did not do that. That is a breach of contract, short and simple.

[37] The other singularly unmeritorious defence advanced by the appellant was that there was no privity of contract between the appellant and the respondent because the letter of 25 November 1997. The learned judicial commissioner had no difficulty in rejecting this defence which has absolutely nothing whatsoever to do with the facts of this case. The doctrine of privity in its application to the law of contract simply means that a stranger to a contract cannot acquire benefits nor be incumbered with burdens under it. So, to succeed, the appellant has to show a tripartite relationship in the first place. Here, the contracting parties were the appellant and the respondent. The others, namely the Director of Forests and the Secretary for Natural Resources (Datuk William Shim) acted throughout merely as the appellant's amanuenses. The doctrine of privity has as much affinity to the facts of this case as cheese has to chalk.

[38] I now turn to deal with the issue of quantum. The respondent led evidence of the losses it had suffered because of the breach of contract. Some of it is what the law, for pure convenience calls 'expectation loss' whilst the rest is what it calls 'reliance loss'. Each of these expressions is merely another way of stating what damages the innocent party may recover for a breach of contract. It was once thought that a plaintiff may only recover either loss but not both. That was wrong. At the end of the day, the true question for the court is to determine the fair compensation in monetary terms that the plaintiff should receive in accordance with the justice of the case. That was made clear by Lord Bridge in his speech in *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344:

> My Lords, damages for breach of contract must reflect, as accurately as the circumstances allow, the loss which the claimant has sustained because he did not get what he bargained for. There is no question of punishing the contract breaker. Given this basic principle, the court, in assessing the measure of the claimant's loss has ultimately to determine a question of fact, although the law has of course developed detailed criteria which are to be applied in ascertaining the appropriate measure of loss in a wide variety of commonly occurring situations. Since the law relating to damages for breach of contract has developed almost exclusively in a commercial context, these criteria normally proceed on the assumption that each contracting party's interest in the bargain was purely commercial and that the loss resulting from a breach of contract is measurable in purely economic terms. But this assumption may not always be appropriate.

[39] In the same case, Lord Jauncey of Tullichettle said:

> Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained.

[40] It follows that the issue of what damages should be awarded for breach of contract in a given case is fact sensitive. An appellate court ought not to intervene unless the trial court has either erred in principle or has made an award that is manifestly unjust on the facts.

[41] In the present case, this is what the judicial commissioner said about the issue of damages:

> The loss and damages suffered by the plaintiffs in consequence of the defendant's breach of the contract to renew the Timber Licence amounted to RM21,890,113.75. How this was arrived at was explained by PW2 in her unchallenged testimony which was clear and comprehensive. I do not, however, accept the view that the plaintiffs ought to be entitled to an additional sum to reflect the alleged decline in value of our currency since the breach occurred in 1998 because no evidence was led to support it. I do not also find it necessary to consider the declaratory relief relating to the defendant's violation of the plaintiff's legitimate expectation because they were not seriously pursued by the plaintiffs and had since been rendered essentially academic. In the circumstances, I allow the plaintiff's claim for loss and damages and accordingly enter judgment for the plaintiffs in the sum of RM21,890,113.75 with interest thereon at 8% per annum from date of judgment till full settlement. I also order costs for the plaintiffs to be taxed unless agreed.

[42] Now, I must confess that when I first read the judgment under appeal I thought that the commissioner had made too large an award and that this case ought to be sent back for re-assessment. But having read and re-read his judgment and having considered the authorities, I am convinced that my first impression was wrong and that the learned commissioner's judgment on the point is unassailable. I do not think it open to this court to interfere on the finding made by the learned commissioner when the figures were not even challenged by the appellant. The notes of the proceedings taken down by the learned commissioner makes it amply clear that the defendant's primary, if not its sole, target was the issue of liability and not quantum. Having taken such a position in the court below, it does not accord with justice to permit the appellant to re-open the issue before us.

[43] Because of the view I have formed on the first question, I find it quite unnecessary to deal with the second that deals with the issue of legitimate expectation. It is a very interesting area of the law. There is ample authority to support the proposition that the doctrine of legitimate expectation has both procedural and substantive dimensions (see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 and the cases cited therein. A promise by the Executive to one or more of its citizens that it will act in a particular way is binding and may be enforced, subject to considerations of public interest (see *Sharma Transport v Government of Andhra Pradesh* AIR 2002 SC 322). In this context, it is useful to recall the following statement of principle by Shah J in *Union of India v Anglo-Afghan Agencies Ltd* AIR 1968 SC 718:

> Under our jurisprudence, the government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen.
>
> This dictum has been recently applied by the Indian Supreme Court in *State of Punjab v Nestle Indian Ltd* [2004] 2 LRI 839. Though sorely tempted to state my views on the point, I abstain from doing so because this is at the end of the day is really a case of breach of contract.

[44] For the reasons already given, I would dismiss this appeal with costs and affirm all the orders made by the High Court. There is a cross appeal. It was not seriously pursued by the respondent. I would dismiss with no order as to costs.

Appeal allowed.

Reported by Peter Ling